



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT KAKAMEGA
MISC CIVIL APPLICATION NO.85 OF 2015

JENNIFER LINA MUTSIMBO

(Suing in her own capacity and at the same time

The legal representative of the estate of

FESTO ALLAN MWAHI – Deceased)APPLICANT

VERSUS

WESTERN CROSS EXPRESS COMPANY LIMITED

MOMBASA MAIZE MILLER.....RESPONDENTS

R U L I N G

Introduction

1. The application for determination is the Notice of Motion dated 8th October 2015 brought under Section 1A, 1B, 3A and 5 of the Civil Procedure Act and order 51 Rule 1 of the Civil Procedure Rules 2010 seeking the following main orders:-

1. THAT this Honourable Court be pleased to transfer and place the case in Kakamega CMCC No.216 of 2015 formerly Kakamega H.C.C.C. No.10 of 2013 before the Honourable Judge for the purposes of writing and delivery of judgment.

2. THAT the costs of this application be provided for.

The application is premised on the grounds set out on the face of the application specifically that the lower Court lacks pecuniary jurisdiction to determine the case.

2. It is supported by the annexed affidavit of VICTOR O. OSANGO an advocate of the High Court of Kenya sworn on the 8th day of October 2015. He details out how the suit was first filed in the High Court being Kakamega H.C.C.C. No.10 of 2013 wherein parties agreed on the issue of liability and recorded a consent to that effect and further that the Judge on his own volition ordered the file to be transferred to the Chief Magistrates Court for assessment of damages. He explains that after the said file Kakamega HCCC No.10 of 2013 was transferred to the Chief Magistrate's Court, it was given a new number being Kakamega CMCC No.216 of 2015 and placed before the Senior Principal Magistrate for hearing. The

parties agreed to canvas their case by filing written submissions on quantum. The applicant's claim against the respondents and third party jointly and severally was quantified at up to kshs.9,575,650/= plus costs and interest. Mr Osango depones that the applicants claim against the Respondents thus exceeds the jurisdiction of the Chief Magistrate's Court whose pecuniary jurisdiction does not exceed Kenya shillings 7 million, while the presiding Magistrate does not have the jurisdiction which exceeds Kenya shillings five (5) million.

3. It is also deponed by Mr. Osango that the transfer of the suit from the High Court to the lower Court was done by mistake. He claims that the respondent will not suffer prejudice if the orders sought are granted but the applicant stands to suffer immense costs especially on dependency if the applicable multiplier as well as the dependency ratio of 2/3 is not applied for lack of jurisdiction by the lower Court.

4. The application is opposed. The 1st respondent has filed grounds of opposition dated 6th day of November 2015 while the 2nd respondents grounds are dated 10th November 2015.

Submissions

5. The application herein was canvassed orally. Mr. Osango relied on his supporting affidavit and further submitted that the cases were transferred to the lower Court for purposes of assessing damages as liability had already been agreed upon and a consent recorded.

6. He added that in their submission on quantum the amount due was in excess of kshs.15 million which is beyond the pecuniary jurisdiction of the Chief Magistrate's Court which is 7 million and that the issue for determination was whether Court can set aside a consent order/judgment and relied on the case of **FLORA WASIKE -VS- DESTIMO WAMBOKO C.A. NO.81 OF 1984** where it was held a consent order can be varied discharged where same has been obtained by fraud, collusion or by agreement contrary to policy of Court or where there is a reason which would make a Court set aside a contract. He argues that there is an error on the face of the record because the applicant was not aware that the amount due was more than 7 million.

7. On the provisions of Cap 405 Laws of Kenya, Mr. Osango submits that the act is between insurer and insured and not the applicant who is not party. He maintains that this Court has jurisdiction to hear and determine the instant suit as the Chief Magistrate's Court has no jurisdiction to award more than kshs.7 million.

8. Miss Luyali for 1st respondent in response relied on the grounds of opposition. She submits that the orders to transfer the suit were by consent of both parties. She maintains that no sufficient reason has been given to retransfer the suit to the High Court since the applicant never objected to the suit proceeding in the lower Courts. She maintains that the lower Court has jurisdiction to determine this suit pursuant to Section 5(b) (iv) of the Insurance Act.

9. She further submits that the case in the lower Court is complete and therefore the application is incompetent and an abuse of the Court process. Further that no orders have been sought to set aside the consent orders or start the cases afresh. She argues that if the application is allowed, it will prejudice the 1st respondent in terms of costs. She prays that the applicant's application be dismissed with costs.

Determination

10. Having heard the parties' arguments and submissions and having carefully read and considered the application and the supporting affidavit together with the grounds of opposition, and also upon careful consideration of the record, it is not true as stated by Osango that the High Court transferred the suits on its own violation. The parties herein agreed to the transfer and a consent was recorded which consent has not been appealed against nor set aside.

11. While this Court recognizes that it has original and appellate jurisdiction to hear all matters the said

matters should be filed before the appropriate Courts. Jurisdiction is everything to a Court as was rightly stated by Counsel for the Applicant. In any event, recent developments show that the pecuniary jurisdiction in the Chief Magistrate's Court has been enhanced. Section 7 of the Magistrate's Courts Act No.26 of 2015 which commenced on 2nd January 2016 provides for the Civil jurisdiction of Magistrate's Courts. It states as follows:-

"7(1) A Magistrate's Court shall have and exercise such jurisdiction and powers in proceedings of a civil nature in which the value of the subject matter does not exceed-

- a) twenty million shillings, where the Court is presided over by a Chief Magistrate;
- b) fifteen million shillings which the Court is presided over by a Senior Principal Magistrate;
- c) ten million shillings, where the Court is presided over by a Principal Magistrate;
- d) seven million shillings, where the Court is presided over by a Senior Resident Magistrate or
- e) five million shillings where the Court is presided over by a a Resident Magistrate.

12. In my considered view therefore, if the applicant's fear was that the presiding learned Magistrate would not have jurisdiction to award the sums the applicant thinks he is entitled to, then Section 7 of the Magistrate's Courts Act No.26 of 2015 has obliterated such fear. But more fundamentally, the applicant has not given any substantive reason why, after the case was transferred to the lower Court by consent of the parties, the case should be retransferred to the High Court. The Principles of setting aside consent judgment/orders as set out in the Flora Wasike case (above) should not be flippantly applied by Courts. A consent judgment/order can only be set aside for reasons that would warrant the setting aside of a contract, unless the parties themselves agree. In the instant case, there are no such reasons nor have the parties agreed.

13. Finally, I am of the humble view that the applicant is a vexatious litigant who is also trying to abuse the process of this Honourable Court. The applicant's application is therefore without merit is vexatious and is also an abuse of the Court process. The same is hereby dismissed with costs to the 1st respondent.

14. The determination herein shall apply Mutatis Mutandis to Misc. Application Number 85 of 2015 – **Jennifer Linoa Mutsiambo – vs- Western Cross Express Company Ltd and Another.**

15. Orders accordingly.

Ruling delivered, dated and signed in open Court at Kakamega this 9th day of March 2016.

RUTH N. SITATI

J U D G E

In the presence of:

Mr. Osango (present) for Applicants

N/A for 1st Respondent

Mr. G.P Omondi (present) for 2nd Respondent

Mr. Lagat - Court Assistant